No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

DALLAS M. PARNELL,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are not yet reported. The opinions appear as Appendices I to V, inclusive, at pages 23-54, inclusive, of the Petition for Writ of Certiorari.

JURISDICTION

The Petitioner has exhausted all of his remedies in the State courts of Texas. It is questioned by the Respondent that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

QUESTION PRESENTED

Where a state trial court in Texas submitted a criminal case to the jury on one count of a three-count indictment, resulting in a conviction on the count submitted, and thereafter the highest court in the State of Texas having criminal jurisdiction ruled that the evidence was sufficient to sustain a conviction on the count submitted, will the Supreme Court of the United States review such interpretation of state law in order to make its own determination of how the case should be submitted to the jury and the evidence necessary to convict under the count submitted?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1, which reads in part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

Respondent denies each and every allegation of fact stated by Petitioner in his Petition, except those

facts supported by the record, and those facts specially admitted by the Respondent.

This is a criminal case in which the Petitioner was charged by indictment in three counts (Transcript, page 3), as follows:

1. Theft of $225,000.00 from the Physicians Life and Accident Insurance Company of America, a corporation;
2. Embezzlement of $225,000.00 from the Physicians Life and Accident Insurance Company of America, a corporation;
3. A conspiracy between Petitioner and four other named persons to embezzle $225,000.00 from the Physicians Life and Accident Insurance Company of America, a corporation.

The case was tried before a jury in Criminal District Court No. 3 of Dallas County, Texas. After the State had presented its case, Petitioner, prior to offering his evidence, filed a motion to require the State to elect the count in the indictment on which it would rely for a conviction (Transcript, page 55), which motion was overruled by the Court. After both sides had rested, Petitioner filed a second motion to require the State to elect (Transcript, page 60), which motion was overruled by the Court. Thereafter, the State of Texas elected to stand on the second count of the indictment, and the Court submitted the case to the jury on the count charging embezzlement (Transcript, page 64). The jury found the Petitioner guilty as charged in the second count

of the indictment (Transcript, page 70). Petitioner did not file a Motion for New Trial, but instead gave notice of appeal to the Court of Criminal Appeals of Texas (Transcript, pages 99 and 100). The Court of Criminal Appeals of Texas which is the highest court in Texas having criminal jurisdiction, delivered its opinion affirming the judgment of the trial court on April 29, 1959. Opinion overruling Motion for Rehearing was delivered on October 14, 1959, and Opinion overruling Second Motion for Rehearing was delivered on February 24, 1960.

Respondent urges that there is no substantial Federal question presented for determination by the Supreme Court of the United States. Petitioner's contentions may be summarized briefly into the following proposition: That the evidence which was presented by the State at his trial does not constitute the offense of embezzlement; or, in the alternative, that the proof of that which was taken, if any, did not correspond with that which was alleged in the indictment to have been taken.

Petitioner's version of what the evidence showed is set forth in his Petition. The testimony in this case shows a series of corporate financial transactions, involving the books, accounts, and stock of two corporations, and the collateral notes of the Petitoner and certain other persons, all of whom were officers and/or directors in both companies. The State's version, which the jury accepted, is summarized in the Opinion of the Court of Criminal

Appeals of Texas (Petition, Appendix I, page 23), and is considered sufficient by that Court to sustain the conviction under Texas law.

ARGUMENT.

A brief summary of the Texas rule on multiple count indictments and election by the State is as follows:

> "The defendant may be charged with the offense in as many separate counts as may be believed necessary in order to meet the proof as it may develop and to avoid a variance." 16 Texas Jurisprudence, section 120, page 129.
>
> "Where a single transaction may constitute a number of possible offenses, the pleading should charge the various offenses in separate counts." 23 Texas Jurisprudence, section 50, page 660.
>
> "An indictment may charge in separate counts two or more distinct felonies of the same nature, differing only in degree, provided they relate to the same transaction." 23 Texas Jurisprudence, section 51, page 661.
>
> "Where a single act or transaction may constitute two or more distinct offenses the state may elect the offense for which it will prosecute the accused." 23 Texas Jurisprudence, section 52, page 662.

Petitioner was charged by indictment in three counts, in three different ways, concerning one broad transaction, and afterwards the State elected to stand on one of the counts, all in accord with

Texas law. Petitioner's complaint before this Court is that the evidence does not support the count elected.

As stated by the Court of Criminal Appeals of Texas in the Opinion in this case, at page 34 of the Petition:

> "There is no settled mode in which appropriation of money or property of the principal by the officer authorized to receive and handle it must take place. It may occur in numberless ways, and the appropriation consumated in any manner capable of affecting it."

See also 16 Texas Jurisprudence, sections 55 and 56, pages 69-71.

Thompson v. City of Louisville, 80 S. Ct. 624, cited by Petitioner, is not applicable to this case now before this Court. There the Petitioner was given a summary conviction in a Police Court on "trumped up" charges, and the higher courts in Kentucky in effect asked this Honorable Court to give the Petitioner relief, since those courts were without jurisdiction under state law to hear an appeal where the fine was so small.

This case now before this Court was fully appealed in the Court of Criminal Appeals of Texas (Petition, Appendices I through V). Theft, embezzlement, and conspiracy to commit embezzlement are all related offenses within the same family of crimes. For this Honorable Court to review this criminal case upon its constituent elements to de-

termine for itself whether the evidence is sufficient to support any one count of a multiple-count indictment charging one transaction in three different ways, would be to hold in effect that what constitutes the elements of a crime under State law is a substantial Federal question.

In 54 American Jurisprudence, section 263, at page 901, it is stated:

> "It is essential to the jurisdiction of the Supreme Court on certiorari to a State court that it appear affirmatively from the record not only that a Federal question was presented for decision in that court, but also that its decision of the Federal question was necessary to the determination of the cause, and that the question was actually decided or that the judgment as rendered could not have been given without deciding it."

It is submitted that no substantial Federal question was decided when the state courts in Texas decided what evidence constituted proof of the offense of embezzlement under the laws of Texas.

CONCLUSION

We respectfully submit, therefore, that the Petitioner does not submit a substantial Federal Question, and for the foregoing reasons it is respectfully

submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
The State of Texas

Service

I, Leon F. Pesek, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent; I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Petitioner's attorney, Mr. Dorsey B. Hardeman, P. O. Box 70, San Angelo, Texas.

Leon F. Pesek
Assistant Attorney General